IN THE

Supreme Court of the United States

OCTOBER TERM— 1949

No. 42

42

UNITED STATES OF AMERICA,

Petitioner,

—against—

LILLIAN SPELAR, as Administratrix of the Estate of Mark Spelar, deceased,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Opinions Below

The United States District Judge for the Eastern District of New York dismissed the complaint with an opinion reported at 75 F. Supp. 967. The Court of Appeals unanimously reversed the order of dismissal, with an opinion reported at 171 F. (2d) 708.

Jurisdiction

The Petitioner seeks to invoke the jurisdiction of this Court by applying for a writ of certiorari pursuant to 28 U. S. C. A. 1254(1).

Question Presented

Whether that portion of Newfoundland, possession of which was ceded to the United States pursuant to the Executive Agreement and 99 year lease entered into between the British Government and the United States of America on March 27, 1941 (55 Stat. pt. 2, 1560-1594) is a foreign country within the statutory intendment of Section 943, subdivision (k) of the Federal Tort Claims Act (now 28 U. S. C. A. 2680(k)), which excludes any claim arising in a foreign country.

Statutes Involved

The statutes involved are the Federal Tort Claims Act and the Executive Agreement and 99 year lease between the United States and Great Britain.

The Tort Claims Act has now been restated and included in the Judicial Code. However, one of the sections of the Tort Claims Acts having some significance in connection with the problem of construing legislative intent was revised after the commencement of the action below, and it is concededly the language of the original Tort Claims Act which Petitioner seeks to have construed.

The pertinent portion of the original Tort Claims Act (60 Stat. 843, 28 U. S. C. 931) provided:

> "Subject to the provisions of this chapter, the United States District Court for the district wherein the plaintiff is resident, or wherein the act or omission complained of occurred, including the United States District Courts for the territories *and possessions of the United States*, * * * shall have exclusive jurisdiction * * * on any claim against the United States, for

> money only on account of * * * personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his * * * employment, under circumstances where the United States if a private person would be liable to the claimant for such * * * death in accordance with the law of the place where the act or omission occurred." (Italics and deletions ours.)

In the revised Judicial Code, instead of authorizing jurisdiction in the United States District Courts for all the territories and possessions of the United States, jurisdiction of courts outside the states is confined to the District Court for Alaska, the Canal Zone and the Virgin Islands. However, at the time of the commencement of the action (April 24, 1947) the Act conferred jurisdiction on United States District Courts in all of the territories and possessions of the United States.

Section 943, subdivision (k) (unchanged in the revision and now 28 U. S. C. A. 2680-k) provides:

> "The provisions of this chapter shall not apply to any claim arising in a foreign country."

While the Court has previously considered the terms of the Executive Agreement and 99 year lease involved herein in connection with *Vermilya Brown Co. v. Connell*, 335 U. S. 377, there will be made available to the Court a copy of the Agreement, together with the notes that were exchanged in connection therewith, as they appear in Document No. 158 of the House of Representatives, 77th Congress. Emphasis by underlining have been supplied to those portions of the Executive Agreement believed to be of special significance in consideration of the question presented.

Statement

The Respondent is the widow of a deceased employee of American Overseas Airlines, residing in the Eastern District of New York and duly appointed Administratrix of her husband's estate by the Surrogate's Court in Queens County, in the Eastern District of New York.

She commenced her action to recover damages for the wrongful death of her husband, pursuant to the Federal Tort Claims Act, in April of 1947, in the District Court of the United States for the Eastern District of New York, alleging that her husband received fatal injuries at or near Harmon Field, Stephenville, Newfoundland, on October 3, 1946, as a result of the defendant's negligence.

Harmon Field is one of the areas covered by the Executive Agreement and 99 year lease of March 27, 1941 (55 Stat. pt. 2, 1560-1594, House Document #158, 77th Congress, 1st Session). The Government moved to dismiss the action upon the ground that the Court lacked jurisdiction, since the claim arose in a foreign country (ff. 23, 24). In granting this motion, the District Judge predicated his opinion on the application of "the familiar principle that a Congressional waiver of sovereign immunity is to be narrowly construed. And under any narrow construction of the statute the expression 'foreign country' certainly applies to Newfoundland and even to areas within it over which the United States exercises many, but not all of the powers of a sovereign" (ff. 39, 40).

The Court of Appeals unanimously reversed on December 8, 1948, which was just two days after the announcement of the opinion of this Court in *Vermilya-Brown Co.* v. *Connell*, rejecting the doctrine of a "niggardly" construction to the provisions of the Tort Claims Act, and pointing out moreover that the statutory exception re-

ferring to a "foreign country" is sufficiently precise and explicit, so that even without the *Connell* precedent the widow's claim must be held included in the coverage of the Act.

Argument

On March 27, 1941, the possession and control of the air base and surrounding territory involved here was ceded to the United States by virtue of an Executive Agreement implemented by a 99 year lease. This was the same Executive Agreement analyzed in detail by the Court of Appeals in the Second Circuit in *Connell et al.* v. *Vermilyea Brown Co.*, 164 F. (2d) 924, and by this Court in *Vermilyea Brown Co.* v. *Connell*, 335 U. S. 377, and another detailed analysis would be superfluous here.[1] The complaint of the Respondent lay properly unless the area so demised remained a foreign country.[2] The grant to the United States carried with it, however, not only possession for 99 years, but so many broad grants of powers, including legislative and judicial jurisdiction, that it would seem to clearly foreclose a judicial determination that the leased areas remained a foreign country. While a foreign country is generally thought to be one with the status of an international person, with the rights and responsibilities under international law of a member of the family of nations, the minimal requirement appears to be that it be *exclusively* within the sovereignty of a foreign nation.

1 See Agreement as filed with clerk in which significant grants of sovereign powers to the United States have been underlined.

2 28 U. S. C. 2680(k).

3 *De Lima* v. *Bidwell*, 182 U. S. 1, 180.

The only argument made by the Government for granting review here, in spite of what would appear to be the conclusive authority of *Vermilya Brown Co. v. Connell*, 335 U. S. 377, is that the intent of Congress in using the term "foreign country" is still open to judicial exploration, and that this Court should undertake a long and exhausting safari into the deep jungles of legislative history, where the Court is assured will be found evidence of an intent not to make tort controversies with the United States justiciable under the laws of a foreign country. It should be perfectly clear that the expedition would be abortive and the trophy mere fool's gold; even granting the motivation of Congress to be a caution not to make the Government of the United States subject to the processes of a foreign country, it is perfectly clear that in the case of the leased areas of Newfoundland the Government of the United States has the *power* to enact its own legislation and set up its own judicial processes. So far as this statute is concerned, and granting the legislative purpose which the government argues, Harmon Field is indistinguishable from any other possession of the United States.

Article I, of the Executive Agreement, gives the United States all rights, powers and authority appropriate for the use and control of the area.[4] This power to legislate for the leased areas has already been exercised in the case of the Longshoremen's & Harborworkers' Compensation Act,[5] and Congressional reports recognize that civil courts have not

[4] And see the last portion of Article III, which makes it clear that these powers include authority to legislate unilaterally and establish courts without consulting the United Kingdom.

[5] *Defense Base Act*, 56 Stat. 1028, 42 U. S. C. 1651 (1942).

been established only because of practical difficulties and the judicial system of courts martial has therefore been made applicable.

It is therefore absolutely consistent with a Congressional intent to insulate petitioner's liabilities under the Tort Claims Act from the force and effect of the laws of a foreign country to acknowledge the perfectly obvious fact that the "leased areas" are not foreign countries. The petitioner can enact its own death statute for the leased area, or declare the Newfoundland statute repealed in the leased area; not having done so it is clear as a matter of construction that Congress has approved the Newfoundland Death Statute as fair and reasonable. The Newfoundland

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6 The report of the Senate Committee on Naval Affairs (Senate Report #26, January 28, 1943, U. S. Code Congressional Service, pp. 2 to 8) recommended favorable consideration of a bill which extended Naval courts martial to certain persons in leased areas outside the continental limits of the United States. This bill became law on March 22, 1943 (34 U. S. C. A. 1201). The report pointed out that a similar law had already been passed for civilians accompanying the armed forces without the territorial jurisdiction of the United States (Article 2(d) of the Articles of War, 41 Stat. 787, 10 U. S. C. 1473 (d)).

The report points out (page 8):

> "The President has stated that civil courts will not be established in leased areas beyond the territorial jurisdiction of the United States.
>
> There are many practical difficulties connected with the administration of justice in the outlying islands through the civil courts when such islands are occupied in time of war or national emergency almost solely by the armed forces and persons accompanying or serving them.
>
> It is highly desirable to provide during such time for the administration of justice in these areas in the cases of civilians offending against naval laws, and also to have civilians employed in adjacent areas by the Army and Navy, respectively, or by their contractors amenable to similar laws, jurisdiction and courts.

7 In any event, local private law continues until altered by the successor legislative authority. *United States v. O'Donnell*, 303 U. S. 501 (1938); *Shapleigh v. Mier*, 299 U. S. 468 (1936) and the petitioner does not dispute that the Newfoundland Death Statute governs although it reaches this conclusion by a process of interpretation with [illegible]

Death Statute (ff. 15, 16) is identical with the death statute in many states.[5]

Those reasons of high international and critical domestic policy which may have prevailed on four justices of this Court to dissent in *Vermilya Brown v. Connell, supra*, are not present here. On the contrary, there is no rational basis for distinguishing between the remedy that should be available had the Respondent's husband been killed at an airfield in Guam, which became a territory of the United States by treaty, and the Newfoundland base which came into our possession by agreement and lease. The lessor's reversionary interest after 99 years and the restrictions imposed on colonization and commercialization of the ceded area during the term of the lease are obviously irrelevant.

Another complication of *Vermilya Brown* not present here is that the Fair Labor Standards Act was passed prior to the acquisition of the bases. The Tort Claims Act, using the exception of "foreign countries" was enacted in 1946, which even followed the extension of the Longshoremen's & Harborworkers' Compensation Act to these bases.

If the Petitioner validly anticipates "a large potential liability" in these leased areas (the occupants of which are largely military and civilian employees of the Petitioner having other exclusive statutory remedies for deaths and personal injuries) then the remedy should be legislative. The language and purpose of the present statute is too clear and explicit for judicial reformation. There are no authoritative decisions in other circuits to the contrary.

[5] As a practical matter, the petitioner must accept whatever death statute is passed by the states, but it can write its own ticket in this alleged "foreign country."

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: April 5, 1949.

Respectfully submitted.

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